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**EX PARTE COMMENTS**

By Electronic Filing

October 17, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122; *IP-Enabled Services*, WC Docket No. 04-36; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45

Dear Secretary Dortch:

In response to the recent number of letters and ex parte comments filed over the past few months with the Federal Communications Commission ("FCC") regarding intercarrier compensation reform, as well as industry reports that the FCC intends to approve a comprehensive intercarrier compensation ("ICC") and universal service fund ("USF") reform plan by November 5, 2008, the New England Conference of Public Utilities Commissioners ("NECPUC")[1] respectfully submits this ex parte communication. Although it is unclear exactly what proposal or proposals the FCC is concentrating its review on, since it only issued a notice for comment on part of an AT&T Communications filing,[2] industry reports seem to indicate that the FCC is most closely

[1] NECPUC is a non-profit corporation comprising the utility regulatory bodies of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. Every New England utility commissioner is a member of NECPUC for the duration of his or her tenure. NECPUC provides regional regulatory assistance on matters of common concern to the six New England states. NECPUC has no independent regulatory authority. It addresses issues challenging the electricity, gas, telecommunications and water industries.

[2] Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers, WC Docket No. 08-152, (filed Jul. 17, 2008); also filed with letter to Chairman Martin in the following proceedings: *In the Matters of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Intercarrier Compensation for ISP-Bound Traffic*, WC Docket No. 99-68; and *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, (filed July 17, 2008) ("AT&T

examining a proposal filed by Verizon Communications ("Verizon Plan" or "Plan"), which is similar to AT&T's proposal.[3] Therefore, NECPUC focuses its ex parte on Verizon's proposal. For the reasons discussed below, NECPUC strongly opposes Verizon's ICC reform plan and its purported legal justification for the FCC to adopt its Plan.

Specifically, NECPUC opposes adoption of Verizon's Plan for two primary reasons: (1) Verizon's Plan, to the extent it requires the FCC to preempt state authority over intrastate access charges, reciprocal compensation, and interconnection authority, under Section 252 of the Telecommunications Act of 1996 ("the Act") would violate federal law and thus could not be adopted[4]; and (2) should the FCC adopt a reform plan in the near future that is comparable to or strongly influenced by Verizon's Plan, it will have been adopted through a questionable process that does not give due consideration to the full range of perspectives of the many stakeholders affected by this complex issue. Aside from possibly violating proper procedure, such a process is likely to lead to protracted litigation, thus frustrating the ultimate goal of sustainable ICC reform.

This analysis focuses solely on preemption of state authority under Verizon's Plan and the truncated and ad hoc process by which the FCC has gone about instituting this reform. To the extent plans filed by other parties, including AT&T, have the same or similar components and legal justification, NECPUC opposes those proposals as well. Lack of comment by NECPUC on other aspects of Verizon's Plan or White Paper should not be interpreted as support.

## I. SUMMARY OF VERIZON PLAN AND WHITE PAPER

Verizon submitted its intercarrier compensation reform Plan to the FCC on September 12, 2008.[5] In this Plan, Verizon proposes a four-"dial" framework: (1) the Rate Dial – where the FCC would establish an apparently arbitrary $.0007 default termination rate for all carriers and all traffic, with a transition period of three years, "regardless of jurisdiction and technology, unless the parties reach a voluntary

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Plan and Petition for Interim Declaratory Ruling and Limited Waivers"). The FCC issued a Public Notice seeking comment on this Petition for Interim Declaratory Ruling on July 24, 2008 (Public Notice, WC Docket No. 08-152, rel. Jul. 24. 2008).

[3] Verizon Letter filed in the proceedings: *In the Matters of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, and *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, (filed September 12, 2008); Verizon Ex Parte with attached Memorandum captioned: "*The Commission has Legal Authority to Adopt a Single, Default Rate for All Traffic Routed on the PSTN"* filed in the proceedings: *In the Matters of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *and Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, (filed September 19, 2008) ("Verizon White Paper").

[4] Verizon's Plan also would require that the FCC declare non-nomadic, fixed VoIP traffic as interstate, even though the FCC's justification for assuming authority over intrastate nomadic VoIP traffic does not apply to non-nomadic VoIP.

[5] Verizon Letter, CC Docket No. 01-92, CC Docket No. 96-45 (filed September 12, 2008). Verizon subsequently filed at least two Ex Partes in which it ostensibly clarified certain aspects of its Plan. (Verizon Ex Parte, CC Docket No. 01-92, WC Docket No. 04-36, CC Docket No. 96-45 (filed October 2, 2008); Verizon Ex Parte, CC Docket No. 01-92, WC Docket No. 04-36 (filed October 3, 2008)).

commercial agreement to the contrary;"[6] (2) the National Comparability Benchmark Dial – where, despite varying state population densities and network architectures, the FCC would establish a national benchmark rate based on "averages" (either based upon an "average urban rate for flat-rate residential local telephone service" or an "average revenue per local exchange line from all sources") that would allegedly represent "an amount that residential end users in today's communications environment can reasonably be expected to pay for service on a monthly basis;"[7] (3) the Subscriber Line Charge ("SLC") Dial – where the FCC would increase current federal SLC caps in order to apparently permit incumbent local exchange carriers ("ILECs") "to meet the Benchmark" by having the option to recover from their end-users the net revenue lost from rate changes to the $.0007 terminating rate under the plan;[8] and (4) the Universal Service Fund ("USF") "Replacement Mechanism" Dial – where the FCC would create an entirely new USF support mechanism labeled the "Replacement Mechanism," "separate from the existing universal service support mechanisms previously established by the [FCC]," in order to allow ILECs to recover the "remaining amount" of access revenues lost and unrecoverable under the permitted SLC increases.[9]

On September 19, 2008, Verizon submitted to the FCC a White Paper that explained its Plan and set forth the FCC's purported "legal authority to establish a single, default rate for all traffic routed on the PSTN."[10] The main legal premise behind Verizon's Plan is that in today's marketplace communications traffic is jurisdictionally inseverable and that it is economically infeasible to develop ways to try to establish the traffic's jurisdiction, especially as communications technology evolves.[11] Furthermore, Verizon alleges that this inability to identify traffic has resulted in increased "fraud and arbitrage," resulting in resources being diverted away from "serving consumers and investing in new technologies."[12] After making these assertions, and without providing any documentary or evidentiary support (statistics, case studies, industry reports, etc.), Verizon claims that these "technological and marketplace facts…provide the [FCC] with ample authority to adopt a uniform, *federal* default rate."[13]

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[6] Verizon Letter filed September 12, 2008, at 4. This rate is completely arbitrary since no cost studies or economic analyses have been submitted to support it. The National Association of State Utility Consumer Advocates (NASUCA) offers an insightful rebuttal argument opposing the arbitrary $.0007 terminating rate (*See* NASUCA Ex Parte, CC Docket No. 01-92, at 2-3 (filed Sept. 30, 2008)). Also, despite its claim that "comprehensive reform is sorely needed," Verizon inexplicably seeks to postpone establishment of final originating and transit rate rules until December 31, 2009. (*Id*, at 2; *See also*, pages 4 and 5 of Verizon Plan).

[7] *Id*, at page 7 of Verizon Plan.

[8] *Id*, at 4. *See also*, page 6 of the Verizon Plan, and page 2 of the October 2 Verizon Ex Parte. Based on Verizon's overall Plan language and descriptions, it appears that ILECs would be given an unfair advantage over competitive local exchange carriers ("CLECs") – unlike for ILECs, there does not appear to be any "revenue recovery" mechanisms available to CLECs once the default termination rate is established.

[9] Verizon Letter filed September 12, 2008, at 4; Verizon Plan at 7-8.

[10] Verizon White Paper, CC Docket No. 01-92, CC Docket No. 96-45 (filed September 19, 2008), at 1.

[11] Verizon White Paper, at 2-3 and 5-14.

[12] Verizon White Paper, at 2-3 and 5-14.

[13] Verizon White Paper, at 14 (emphasis added).

The Plan also would apparently preempt the Act's Section 252 state authority over the interconnection process, including arbitrating interconnection disputes and approving agreements, by creating take-it-or-leave-it default pricing rules and architectures for interconnection with Verizon's circuit-switched network, or establishing an unregulated process for next-generation networks where interconnection is subject to commercial agreements and beyond the purview of state commissions. Finally, Verizon's proposal for establishing a unified rate for all traffic would require the FCC to declare that fixed, non-nomadic VoIP traffic is subject solely to FCC jurisdiction.

In its White Paper, Verizon purports to present a workable solution for how a uniform termination rate for all traffic can be established for (1) traffic traditionally subject to state access charge regimes; and (2) traffic traditionally subject to reciprocal compensation rates as established under the Act's § 251(b)(5) and §§ 252(c) and(d) provisions. Based on the premise that today's communications traffic is jurisdictionally "inseverable," Verizon alleges that if states continued with their intrastate access charge regimes after the establishment of a uniform federal rate, then those state regimes would undermine the federal "goal" of "develop[ing] a uniform regime for all forms of intercarrier compensation"[14] by permitting continued "opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions."[15] Since continued state access charge regimes would conflict with and "pose an obstacle" to the federal "goal" of a uniform intercarrier compensation regime, claims Verizon, then the Supremacy Clause of the Constitution permits preemption of those state regimes.[16]

Verizon then tackles the issue of intrastate traffic subject to reciprocal compensation under § 251(b)(5). Verizon claims that § 201 gives the FCC sufficient authority to implement comprehensive intercarrier compensation reform on all traffic subject to § 251(b)(5), citing the § 252(d)(2) rate assessment standard, the § 251(i) provisions and application of the Supreme Court's determinations in *AT&T Corp. v. Iowa Utilities Board*.[17] In the alternative, Verizon states that the FCC could simply choose to forbear from enforcing § 251(b)(5) "insofar as it would require carriers to enter into reciprocal compensation arrangements that are subject to state authority."[18]

[14] Verizon White Paper, at 20, citing "Notice of Proposed Rulemaking," *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) ("Intercarrier Compensation NPRM"), paragraph 97.
[15] Verizon White Paper, at 21, citing "Further Notice of Proposed Rulemaking," *Developing a Unified Intercarrier Compensation Regime*, 20 FCC 4685 (2005) ("Intercarrier Compensation FNPRM"), paragraph 3.
[16] Verizon White Paper, at 4 and 23.
[17] Verizon White Paper, at 26-28. *See also* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).
[18] Verizon White Paper, at 29.

## II. VERIZON FAILS TO ESTABLISH SUFFICIENT LEGAL JUSTIFICATION FOR THE FCC TO PREEMPT STATE JURISDICTION UNDER ITS PLAN

### A. Verizon's Argument Does Not Support FCC Preemption of State Commission Jurisdiction Under the Supremacy Clause

Verizon's arguments for preemption of state authority over intrastate access charges under the Supremacy Clause of the United States Constitution are inherently flawed, and the weaknesses in these arguments extend to traffic subject to § 251(b)(5). First, Verizon's premise for preemption is improper because it is overinclusive of "*all* traffic"[19] routed over the Public Switched Telephone Network "PSTN" and improperly attempts to extend the FCC's determinations made in the *Vonage* Order to all types of VoIP traffic.[20] Second, Verizon's assertion that "the [FCC] can find that state access charge regimes that differ from its single federal default rate *pose an obstacle to the accomplishment of federal goals and policies and are preempted*"[21] is an improper basis for preemption and fails to take into account the precedent set forth in *Louisiana Public Service Commission v. FCC* and *AT&T Corp. v. Iowa Utilities Board*.[22]

#### 1. Verizon's premise for preemption is improper because it is overinclusive of all traffic routed over the PSTN and improperly attempts to extend the FCC's determinations made in the *Vonage Order*.

Verizon's premise for preemption is improper because it is overinclusive of all traffic routed over, or that "touches," the PSTN.[23] Verizon posits that because of providers' purported inability to distinguish between different types of traffic, i.e. IP-based versus circuit-switched originating traffic, then "*all* traffic [including intrastate access traffic and intrastate non-nomadic VoIP traffic] that is routed on the PSTN can no longer be reliably separated and treated differently and is therefore *inseverable for jurisdictional purposes*".[24] Pursuant to its argument on the jurisdictional inseverability of IP-based traffic, Verizon then urges the FCC to extend its VoIP "mixed traffic" findings in the *Vonage Order* to "*all* traffic routed on the PSTN" in order to assert jurisdiction

[19] Verizon White Paper, at 2, 15 (emphasis added).

[20] Verizon White Paper, at 3, 20. *See also* Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd 22404 (2004) ("Vonage Order").

[21] Verizon White Paper, at 23 (emphasis added). *See generally*, Verizon White Paper at 19-25.

[22] *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 476 U.S. 355 (May 27, 1986); *AT&T Corp. v. Iowa Utilities Board*, 199 S.Ct. 721, 525 U.S. 366 (Jan. 25, 1999).

[23] Verizon recommends a $.0007 per minute of use terminating rate "for all traffic that touches the public switched telephone network." Verizon Ex Parte, CC Docket No. 01-92, WC Docket No. 04-36, WC Docket No. 06-122, at 1 (filed Sept. 3, 2008). The indication is that "all" traffic, by definition, is all inter- and intrastate traffic that "touches" the PSTN, includes wireless calls, traditional circuit-switched traffic, all voice over internet protocol ("VoIP") traffic (both nomadic and fixed VoIP), all ISP-bound traffic, and, apparently, any non-VoIP IP-based traffic (such as any broadband or advanced service that utilizes both voice and data communication). In yet another filing, Verizon does concede that its Plan does not address "what compensation may or may not be due for IP traffic that does not traverse the PSTN and does not address the IP-to-IP exchange of traffic" (Verizon Ex Parte, CC Docket No. 01-92, WC Docket No. 04-36, CC Docket No. 96-45, at 5 (filed Oct. 2, 2008)).

[24] Verizon White Paper, at 2, 15 (emphasis added).

over intrastate traffic,[25] despite the fact that the *Vonage Order* dealt with the narrow issue of a nomadic VoIP service.[26] Furthermore, the FCC specified there that "***mixed-use services are generally subject to dual federal/state jurisdiction***, except where it is impossible or impractical to separate the service's intrastate and interstate components."[27] Non-nomadic, fixed VoIP *is* a severable and should remain subject to dual federal/state jurisdiction.

It is not "impossible or impractical" to separate a telephone service's intrastate and interstate components. For instance, "Verizon's own statistics indicate that by December 2008 a majority of households (64%) will still rely on circuit-switched based telephone service – which *is* severable."[28] In addition, Verizon fails to offer a compelling argument or evidence as to why difficulties with some IP-based traffic, as set forth in the *Vonage Order*, warrants preemption of state jurisdiction over jurisdictionally severable intrastate access and non-nomadic VoIP traffic. As the Public Service Commission of Missouri ("Missouri PSC") has pointed out, "preempting all state jurisdiction over access charges to address a limited classification issue is not a narrow, targeted remedy" and, as the Missouri PSC observed in commenting on the Missoula Plan, the Verizon Plan "unnecessarily preempts a number of other areas of state authority [such as over traffic subject to § 251(b)(5)] that have nothing to do with alleged separation problems of wireless and VoIP traffic"[29] (emphasis added).

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[25] Verizon White Paper, at 19-20. *See also* Vonage Order.

[26] "Nomadic" VoIP services are distinguishable from "fixed" VoIP services. Citing *Minnesota Public Utilities Commission v. FCC* (483 F.3d 570 (8th Cir. 2007)), the FCC has recognized that "some VoIP services are "fixed," which means that the end user can use the service from only one location (such as the end user's home)…[as opposed to] a VoIP service that is "nomadic": its customers can place and receive VoIP calls from any broadband Internet connection anywhere in the world…" (FCC's Amici Curiae Brief filed Aug. 5, 2008, at 3, in *Vonage Holdings Corp. and Vonage Network Inc. v. Nebraska Public Service Commission*, Case No. 08-1764, U.S. Ct. of Appeals for the 8th Cir. – available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284738A1.pdf).

[27] Vonage Order at Paragraph 17 regarding "mixed-use" doctrine applicability: "Services that are capable of communications both between intrastate end points and between interstate end points are deemed to be "mixed-use" or "jurisdictionally mixed" services. ***Mixed-use services are generally subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies***. In such circumstances, the Commission may exercise its authority to preempt inconsistent state regulations that thwart federal objectives, treating jurisdictionally mixed services as interstate with respect to the preempted regulations." (emphasis added).

[28] National Association of Regulatory Utility Commissioners ("NARUC") Ex Parte, CC Docket No. 08-152, WC Docket No. 04-36, CC Docket No. 01-92, WC Docket No. 06-122, WT Docket No. 05-194, CC Docket No. 80-286, (filed Oct. 2, 2008) at fn 13; Verizon White Paper, at 8. These statistics, of course, fail to take into account the number of businesses that still rely on circuit-switched based telephone service. There is, too, irony in the fact that, despite its claims of traffic "inseverability," Verizon itself cites to the Biannual "Trends in Telephone Service" released by the FCC's Wireline Competition Bureau, in which many statistics are broken down by jurisdiction and traffic type. *See* Verizon White Paper, at 7, fn 12. *See also* Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *Trends in Telephone Service* (Aug. 2008).

[29] Missouri PSC Comments, CC Docket No. 01-92, at 18 (filed Oct. 24, 2006).

## 2. Pursuant to Supreme Court precedent, the FCC is barred from usurping express state authority solely because it would further a federal goal.

The Supreme Court has consistently held that the FCC cannot preempt express state authority under the Act. In *Louisiana PSC v. FCC* ("*Louisiana PSC*"), the Supreme Court held that § 152(b) specifically barred the FCC from preempting express state authority under the Act solely because it would further a federal goal.[30] In *AT&T Corp. v. Iowa Utilities Board* ("*Iowa Util. Bd.*"), the Supreme Court barred the FCC from setting actual rates for traffic subject to § 252(b)(5); that the FCC's § 201(b) authority is limited under §§ 251 and 252 to only the "issuance of [pricing methodology] rules to guide the state-commission judgments" when establishing just and reasonable reciprocal compensation rates.[31] Supreme Court interpretation of the Act, which permitted FCC establishment of a pricing methodology, does not impart upon the FCC the authority to establish a specific rate or rate cap on §§ 251 and 252 traffic, as Verizon's Plan would have the FCC do.[32]

Pursuant to Section 152(b) of the Act, the FCC is expressly barred "with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with ***intrastate communications service*** by wire or radio of any carrier," except where Congress has clearly expressed an exception.[33] Section 152(b), coupled with § 251(d)(3)[34] of the Act, specifically reserves state authority over intrastate access

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[30] The Court did establish the so-called "impossibility" exception here, where the FCC may preempt state regulation where it is not possible to separate the interstate and intrastate aspects of a service, but that exception is inapplicable here – as discussed above, Verizon argues preemption of *all* intrastate traffic, including circuit-switched traffic, not just wireless and IP-based services (see *Louisiana PSC*, at fn 4). *AT&T Corp. v. IUB*, 525 U.S. 366, 381(1999): "§ 152(b) prevented the Commission from taking intrastate action solely because it furthered an interstate goal," discussing *Louisiana PSC v. FCC*, 476 U.S. 355, 374. *See also* NY Dept. of Public Service ("NYDPS") Comments, CC Docket No. 01-92, at 11 (filed Oct. 25, 2006); Florida Public Service Commission Comments, CC Docket No. 01-92, at 4 (filed Mar. 15, 2007); NARUC Oct. 2, 2008, Ex Parte, at 3, fn 11; NTCA Sept. 30, 2008, Ex Parte, at 2; Missouri PSC Comments, filed Oct. 24, 2006, at 18.

[31] *Iowa Util. Bd.*, 525 U.S. at 380-381 (emphasis added). The pricing methodology at issue in this case was Total Element Long Run Incremental Cost ("TELRIC") pricing, though the reasonableness of this methodology was not determined (*Iowa Util. Bd.*, 525 U.S. at fn 3),

[32] Application of TELRIC pricing on rates subject to state ratemaking authority under § 252(c)(2) and § 252(d) does not preempt state ratemaking authority. As the Court recognized in *Iowa Util. Bd.*, "It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. *That is enough to constitute the establishment of rates*" (*Iowa Util. Bd.*, 525 U.S. at 384) (emphasis added).

[33] 47 U.S.C. § 152(b) (emphasis added). For instance, as Cavalier Telephone and NuVox have pointed out, § 2(c)(3) of the Act gives the FCC exclusive jurisdiction over rates and entry of wireless carriers "[n]otwithstanding sections 2(b) and 221(b)." 47 U.S.C. § 332(c)(3)(A). (Cavalier and NuVox Ex Parte, CC Docket No. 01-92, at 2 and fn 9 (filed Oct. 9, 2008)).

[34] 47 U.S.C. § 251(d)(3): "***Preservation of State Access Regulation***: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission (a) establishes access and interconnection obligations of local exchange carriers; (b) is consistent with the requirements of this section…" (emphasis added).

charge regimes.[35] Furthermore, § 152(b), coupled with § 251(b)(5), § 252(c)(2) and § 252(d)(2), specifically reserves state authority over traffic subject to reciprocal compensation. These express provisions, coupled with the above-cited Supreme Court precedent, would appear straightforward.

In its Supremacy Clause argument, Verizon, however, circumvents the express provisions of the Act, citing FCC federal policy objectives, and completely fails to discuss the relevant Supreme Court precedent (i.e., *Louisiana PSC* or *AT&T Corp. v. IUB*). Instead, Verizon focuses on generic Supremacy Clause or unrelated Supreme Court precedent to support its position, without offering any supporting analysis. The cases that Verizon relies on do not support its argument. For instance, in *City of New York v. FCC,*[36] the Supreme Court deals with preemption of state authority under express provisions of the Cable Act (as opposed to the 1934 Communications Act or the 1996 Telecom Act) and specifically distinguishes this case from *Louisiana PSC*:

> "…"an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana Public Service Comm'n*…***The second reason was particularly relevant in Louisiana Public Service Comm'n because there we were obliged to assess the import of a statutory section in which Congress appeared to have explicitly limited the [FCC]'s jurisdiction***…we conclude here that the [FCC] acted within the statutory authority conferred by Congress when it preempted state and local technical standards governing the quality of cable television signals. When Congress enacted the Cable Act in 1984, it acted against a background of federal preemption on this particular issue."[37]

Furthermore, *Geier v. American Honda Motor Co.*[38] has no relation to an agency's ratemaking authority. Here, the Supreme Court deals with preemption of state tort law by a federal agency regulation under which *only* the federal agency has "authority to implement" under the National Traffic and Motor Vehicle Safety Act of 1966,[39] unlike the dual federal/state authority issued to *both* the FCC and state commissions under the Act. In addition, Verizon cites to *Geier* with the contention that only the FCC, as opposed to state commissions, is "uniquely qualified to comprehend the likely impact of state requirements" since telecom regulation "is technical" and "the relevant history and background are complex and extensive."[40] This flawed analysis completely overlooks the fact that state commissions have been specifically delegated by their state legislatures to oversee and regulate communications operators within their respective states and have

[35] NARUC Oct. 2, 2008, Ex Parte, at 3.
[36] Verizon White Paper, at 23.
[37] *City of New York v. FCC*, 486 U.S. 57, 66 (1988) (emphasis added).
[38] Verizon White Paper, at 23-24.
[39] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000).
[40] Verizon White Paper, at 23-24, citing *Geier*, 529 U.S. at 883.

equivalent understanding as the FCC of such a "technical" subject matter as communications regulation.[41] In fact, state commissions are better qualified and positioned to understand the impact of communications regulations within their respective states.

Finally, there is a judicial "presumption against preemption" that bars FCC authority over intrastate rates.[42] Verizon fails to overcome this presumption in its arguments. As aptly discussed by the NYDPS:[43]

> "When federal courts determine whether federal law preempts states in a field traditionally dominated by state regulation, a presumption against preemption applies. [*Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260 (2004)]. In a traditional state regulatory field, there is a presumption that state and federal regulation can coexist. [*Engine Mfrs. Ass'n*, 541 U.S. at 260]. Thus, state law is presumed to be preserved unless it is the "clear and manifest purpose of Congress" to displace state law. [*Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 716 (1985)]. Because of the States' historical authority over intrastate rates and charges, which the [FCC] has acknowledged [*Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-91, FNPRM, at paragraph 82, (rel. Mar. 3, 2005)], the presumption applies to intrastate…charges."[44]
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> [Italics and cites added in lieu of NYPSC footnotes]

Despite the foregoing, Verizon offers the FCC no statutory authority to preempt state authority of intrastate charges. Based upon the express provisions of the Act and Verizon's failure to offer any statutory authority for its position, Verizon fails to clearly demonstrate preemptive intent on behalf of Congress, and therefore does not overcome the judicial presumption.

For all of the reasons presented above, Verizon fails to establish the requisite legal authority that the FCC needs in order to preempt state authority over intrastate charges by assessing a uniform rate(s) on all traffic. Because Verizon's Plan "is a single, integrated proposal"[45] and since the FCC does not have the legal authority to preempt state authority over intrastate charges, NECPUC urges that Verizon's Plan (or any others that rely on preemption of state authority) should be summarily rejected from a comprehensive intercarrier compensation reform plan.

[41] See, for instance, Massachusetts General Laws ("M.G.L."), Chapter 25, and 159 M.G.L. § 10.
[42] NYDPS Comments filed Oct. 25, 2006, at 12-13.
[43] NYDPS Comments filed Oct. 25, 2006, at 12-13.
[44] NYDPS Comments filed Oct. 25, 2006, at 12-13.
[45] Verizon Sept. 12 Ex Parte, at 1 of the Plan.

### B. Verizon's Argument Does Not Support FCC Preemption of State Commission Jurisdiction Over Reciprocal Compensation Traffic Under § 201[46]

Verizon incorrectly asserts that the FCC's § 201 authority grants it the ability to establish a single rate on traffic subject to § 251(b)(5). Pursuant to the express provisions of § 152(b), coupled with the provisions of §§ 251 and 252, state commissions are provided with exclusive jurisdiction over intrastate reciprocal compensation rates and services, despite the FCC's general § 201 authority.[47] In other words, all of these sections limit the FCC's § 201 authority over intrastate reciprocal compensation rates and services. This has also been expressly affirmed by the Supreme Court, as discussed above. Indeed, Verizon acknowledges the Supreme Court determination, citing *Iowa Util. Bd.*, "Congress gave state commissions – not this Commission – the statutory authority to "establish…rates" for § 251(b)(5) traffic "pursuant to []section [252](d)," 47 U.S. C. § 252(c)(2), (d)(2)…"[48] Despite this, Verizon still attempts to twist the provisions of §§ 251 and 252 (through §§ 251(i) and 252(d)(2)), and overlooks one of the main determinations of *Iowa Util. Bd.*, that the FCC has no intrastate reciprocal compensation ratemaking authority, only authority to establish ratemaking methodology, in order to argue for FCC authority over § 251(b)(5) traffic.[49] No matter how Verizon tries to interpret the provisions of the Act, the premise that the FCC can establish a rate on § 251(b)(5) traffic still fails.

## III. SWEEPING REFORM IS BEST ESTABLISHED THROUGH A TRANSPARENT DELIBERATIVE PROCESS THAT INCLUDES A COLLABORATIVE INDUSTRY APPROACH

Comprehensive reform should be established in a careful, meaningful way through the established NPRM process and not hastily rushed due to an administration change or an unrelated court deadline.[50] The process formerly established in CC Docket No. 01-92 should be continued. For instance, pursuant to its own rules,[51] the FCC implemented a Further Notice of Proposed Rulemaking in this Docket, through which the FCC sought comment on reform proposals or principles submitted by telecommunications industry and interest groups.[52] The FCC subsequently issued at least

[46] Although Verizon's argument references the Commission's § 332 authority (Verizon White Paper, at 26), NECPUC does not discuss Commission authority under this section since this provision deals with ratemaking authority in regards to wireless ("commercial mobile service") carriers. Section 332 has no relation to § 251(b)(5) traffic. Barring the specific market conditions set forth in § 332(c)(3)(A), NECPUC concedes that under this section, state commissions are, generally, expressly preempted from rate regulation for commercial mobile services.
[47] *Iowa Util. Bd.*, 525 U.S., at 380-381.
[48] Verizon White Paper, at 27.
[49] Verizon White Paper, at 26-28.
[50] *See generally*, 47 C.F.R. §§ 1.400-1.430.
[51] 47 C.F.R. § 1.421 "Further Notice of Rulemaking: In any rulemaking proceeding where the Commission deems it warranted, a further notice of proposed rulemaking will be issued with opportunity for parties of record and other interested persons to submit comments."
[52] *FNPRM*, CC Docket No. 01-92, released March 3, 2005. *See also* http://www.fcc.gov/wcb/ppd/IntercarrierCompensation/proceedings.html.

three Public Notices requesting further comment on submitted proposals.[53] There is no legitimate reason for the FCC to not follow its own example and issue another Public Notice or FNPRM seeking comment on recently-submitted proposals. In the alternative, the FCC should issue a Proposed Rulemaking Order for any comprehensive intercarrier compensation reform, as well as to implement supporting cost studies to determine the effects of such reform, in order to allow all interested parties time to respond.

NECPUC respectfully submits that the FCC has strayed from its established rulemaking process in regard to intercarrier compensation reform. Industry reports indicate that the FCC intends to make dramatic and far-reaching changes to the ICC system in order to meet an arbitrary and unrealistic deadline for comprehensive reform, without providing a meaningful opportunity for all interested parties to respond to recently submitted proposals. This process is biased and patently unfair and may violate basic administrative process protections. Therefore, NECPUC urges the FCC not to "rush to judgment" by adopting comprehensive intercarrier compensation reform and instead allow for a transparent, deliberative process that includes a collaborative industry approach.

Recent industry reports indicate that the FCC intends to issue a comprehensive reform Order as a sweeping addition to the narrow requirement established by the D.C. Circuit Court of Appeals in *In re: Core Communications, Inc.* (*"Core"*).[54] There, the D.C. Circuit Court required that the FCC issue "a final, appealable order" by November 5, 2008, "that explains the legal authority for the [FCC]'s interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5)."[55] This case requires *only* that the FCC establish its legal authority in regards to its exclusion of ISP-bound traffic from the § 251(b)(5) requirements. It does not require the FCC to adopt sweeping intercarrier compensation reform. In fact, the FCC "need not do so, and should not attempt to."[56]

Any comprehensive plan hastily developed under an unrelated Circuit Court of Appeals deadline exposes a process of reform that is both flawed and unfair. Comprehensive reform "deserves a purposeful, dedicated review and should not be added as an afterthought to rulings on other issues."[57] Over the past two months, the FCC has been inundated with a number of alternative reform proposals and extensive ex parte filings. In fact, the submittals in CC Docket No. 01-92 since late July of this year number more than 250, and this number continues to grow.[58] This accounts for about 10% of the total number of submittals in this Docket since it commenced in 2001. Verizon and other large carriers, which have a strong interest in the FCC adopting the carriers' own biased reform proposals, are using the November 5th deadline as a pretense for arguing that the FCC now has the best opportunity in years to adopt comprehensive reform. The FCC

[53] Public Notices, CC Docket 01-92, released July 25, 2006; Nov. 8, 2006; Feb. 16, 2007.
[54] *In re: Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008).
[55] *Core*, 531 F.3d at 862.
[56] NASUCA Ex Parte filed September 30, 2008, at 2.
[57] Nebraska Public Service Commission Ex Parte, CC Docket No. 01-91, at 2 (filed Sept. 30, 2008).
[58] *See* FCC Electronic Comment Filing System ("ECFS") "Search for Filed Comments" at http://fjallfoss.fcc.gov/prod/ecfs/comsrch_v2.cgi.

should not be swayed by this argument, and should continue to conduct its review of ICC reform under the established process in this case.[59] Should the FCC issue an Order on comprehensive reform by November 5, interested parties such as state commissions and consumer groups will not have had a meaningful opportunity to review, analyze, and comment on the multitude of competing proposals that may affect them and the consumers they represent.[60] As a result, unnecessary and prolonged litigation is likely to ensue.[61]

If the FCC issued a comprehensive reform Order through this truncated process, utilizing recently proposed plans and recommendations[62] without a meaningful notice and comment period, the FCC will have set a dangerous precedent for future proceedings. The process as it stands now implies that FCC decision is influenced heavily by ex parte meetings and filings that are dominated by the proponents of certain plans in this proceeding. Numbers alone indicate that parties such as Verizon have a decided advantage in this type of process. For instance, Verizon's submittals alone in CC Docket 01-92 account for about 5% of the total submittals for the past two months.[63] If the FCC implements a proposal comparable to Verizon's (or any Order in the near future) without a meaningful notice and comment period, then the message is clear: established NPRM procedure is nothing more than a formality.

This implication has arisen in the past in regard to the FCC's forbearance process for which the FCC has been roundly criticized by numerous carriers and other interested parties, including state and federal policymakers. Pursuant to § 160(c), any forbearance

[59] Of course, NECPUC does not believe that ICC reform should remain bogged down for many more years; only that rushing through a decision under an extremely truncated, ad hoc, and unfair process would be detrimental to the public interest.

[60] The process as it stands now is incredibly chaotic. For instance, the FCC need only look to Verizon's own numerous proposals and explanations as a prime example as to how confusion can arise: Verizon's Plan was first submitted on Sept. 12, 2008. Verizon next filed its Plan's purported legal authority on Sept. 19, 2008. Verizon further "clarified" portions of its Plan through Ex Partes filed on Oct. 2 and 3, 2008. Separate from its "comprehensive" Plan, Verizon filed a separate proposal and its purported legal authority focused solely on ISP-bound traffic (coinciding with the impending *Core* deadline) on Oct. 2, 2008. This chronology does not even account for the joint Verizon-AT&T USF proposal or the number of miscellaneous Ex Partes submitted by Verizon in this Docket. As exemplified here, Verizon's Plan has been dribbled out in pieces over time making it very difficult for parties to respond.

[61] *See* NARUC Press Release, "NARUC Calls for Constructive Engagement on ICC Reform" (rel. Oct. 6, 2008), available at http://www.naruc.org/News/default.cfm?pr=104: "[D]iscussions have made clear that key advocates for at least some, and perhaps many, of parties engaging the FCC have not even read the filings of others, much less understand the extent to which their own filings are comprehended by others. There is a real risk that any single participant or group seeking to impose its own plan will, even if successful, achieve a pyrrhic and short-lived victory, likely followed by protracted litigation, primarily because they failed to recognize a relatively small but critically important number of issues that are absolute deal-breakers for others."

[62] The Verizon Plan, filed Sept. 12, 2008, and Verizon White Paper, filed Sept. 19, 2008, are just two examples; *See* also CC Docket No. 01-92: AT&T Ex Parte in a letter addressed to Chairman Martin ("AT&T Plan"), filed July 17, 2008; Qwest Ex Parte ("Qwest White Paper"), filed Oct. 7, 2008; NTCA Ex Parte, filed Oct. 6, 2008 ("NTCA Interim Proposal"); etc.

[63] *See* ECFS "Search for Filed Comments" at http://fjallfoss.fcc.gov/prod/ecfs/comsrch_v2.cgi. Please note that this statistic does not include any filings submitted by Verizon Wireless under the ECFS system.

request is "deemed granted" if the FCC fails to act by the statutory deadline.[64] Past forbearance proceedings represent a history of incomplete and insufficient filings oftentimes supplemented after the end of established notice and comment periods. It is probably not a coincidence that in proceedings with this "deemed granted" provision, parties commonly submit last-minute filings just prior to the expiration of the statutory deadline. The result there is the same here: the FCC may take action without having all pertinent information available to it, or having to amend its intended decision at the last minute, and interested parties may not have time to meaningfully respond. This process is flawed and inherently unfair to parties, like consumer group and state commissions, that must respond to a moving target, often repeatedly and under very tight timeframes. In fact, Congressional members have held hearings and criticized this process; that the FCC "routinely waits…to make a rushed decision" and that "[s]uch a disjointed process is not likely to result in public policy that benefits consumers."[65]

The FCC should not make the similar mistake here of a "rushed decision" for comprehensive intercarrier compensation and USF reform, because the consequences could be highly detrimental to the industry and the public interest. Sudden sweeping reform without proper study and comment could unfairly advantage a certain class of carriers and be detrimental to a competitive marketplace. For instance, Verizon's Plan establishes an arbitrary $.0007 terminating rate on all traffic, without providing a breakdown of actual carrier costs, and appears to inexplicably permit recovery of lost access charge revenues only to ILECs ("rate-of-return" and "price cap" carriers).[66] In addition, if a Plan such as Verizon's were implemented, many consumers would see an increase in their telephone service prices (through establishment of a national Benchmark Rate and potential increases in the federal SLC) without any recognizable benefit (Verizon's Plan does not require or guarantee that any money "saved" from fewer arbitrage schemes or lower terminating rates will be redirected to consumer savings or advanced services investments).[67] Per Verizon, companies should "look to their own end users" for any lost revenues or to recover costs that exceed the $.0007 terminating rate.[68]

Industry consensus is that intercarrier compensation reform is needed. Such reform, however, should be established after a thorough, open process that allows for the views of all interested parties and through which the industry can, collaboratively, work together to arrive at the best, possible solution. Anything less is likely to result in both unintended and detrimental consequences and lengthy and protracted litigation between industry members and other interested parties. The time is ripe for the FCC to open a round of dialogue and seek comment on recently-submitted proposals.[69] In the

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[64] 47 U.S.C. § 160(c).

[65] *See* Speech of The Honorable John D. Dingell in the House of Representatives entitled "Introduction of Bill on Protecting Consumers Through the Proper Forbearance Procedures Act of 2007" (Oct. 22, 2007) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2007_record&page=E2190&position=all.

[66] Verizon Plan, at 4, 6-9.

[67] Verizon Plan at 6-7; *see also*, Verizon Plan and White Paper, generally.

[68] Verizon White Paper at 33; *see also* Verizon White Paper at 5.

[69] In particular, the proposal that appears to be getting the most attention from the FCC – Verizon's proposal – was never even Noticed for comment.

alternative, if the FCC determines to take action in the near future, it should only address issues that either it is compelled to address (e.g., the ISP-remand issue) or issues that can be dealt with individually, like phantom traffic, and consider comprehensive reforms later after a thorough, open process that allows for the views of all interested parties to be heard.[70]

## IV. CONCLUSION

As demonstrated here, Verizon's Plan and others like it should not be adopted, as they would require the FCC to illegally preempt state jurisdiction over intrastate traffic and interconnection. Furthermore, the FCC should not hastily adopt comprehensive intercarrier compensation reform under an arbitrary deadline through the current biased process. The FCC should instead examine these extremely important issues pursuant to a reasonable and transparent process, such as through the issuance of a Further Notice of Proposed Rulemaking, which allows for open dialogue within the industry in order to tackle these very complicated ICC reform issues – issues that will have profound effect on all industry participants and consumers.

Sincerely,

NEW ENGLAND CONFERENCE
OF PUBLIC UTILITIES
COMMISSIONERS

_____/s/_____
William M. Nugent
Executive Director

and on behalf of their commissions:

_____/s/_____
Anthony J. Palermino, Commissioner
Connecticut Dept. of Public Utility Control

_____/s/_____
Vendean Vafiades, Commissioner
Maine Public Utilities Commission

_____/s/_____
Sharon E. Gillett, Commissioner
Massachusetts Dept. of Telecommunication and Cable

_____/s/_____
Clifton Below, Commissioner
New Hampshire Public Utilities Commission

_____/s/_____
David O'Brien, Commissioner
Vermont Dept. of Public Service

_____/s/_____
John D. Burke
Vermont Public Service Board

[70] As jointly espoused previously by the Maine, Nebraska and Vermont commissions, the FCC "should seek methods of addressing access reform in ways that are less likely to produce legal challenges and [industry] uncertainty. Access reform should remain a joint state and federal enterprise…" (Joint Comments of the Maine Public Utilities Commission, Nebraska Public Service Commission, Vermont Dept. of Public Service, and Vermont Public Service Board in CC Docket No. 01-92, at 13 (filed Oct. 25, 2006)(emphasis added).